145-5-46

RECORD, CASE No. 13,469.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 316.

JULIA H. JENKINS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIAM A. COLLARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JANUARY 4, 1889.

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1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

JULIA H. JENKINS, DUDLEY J. JENKINS, ADA Grace Jenkins, & Albert Gallatin Jenkins, a Minor, and George R. Jenkins, a Minor, by Susan L. Jenkins, Their Guardian, Plaintiffs, } = 4109. At Law.

against

WILLIAM A. COLLARD, Defendant.

2 Be it remembered that heretofore, to wit, on the 28th day of January, A. D. 1888, came the plaintiffs, by their counsel, and filed in the clerk's office of said court their certain petition herein clothed in the words *words* and figures following, to wit:

Petition.

In the Circuit Court of the United States for the Southern District of Ohio.

JULIA H. JENKINS, DUDLEY J. JENKINS, ADA Grace Jenkins, and Albert Gallatin Jenkins, a Minor, and George R. Jenkins, a Minor, by Susan L. Jenkins, Their Guardian, Plaintiffs, } No. 4109. Petition.

vs.

WILLIAM A. COLLARD, Defendant.

First cause of action.—Plaintiffs say that they, Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, Albert Gallatin Jenkins, and George R. Jenkins, are citizens and residents of Cabell county, in the State of West Virginia, and are the children and only heirs of Thomas J. Jenkins, deceased, and that Albert Gallatin Jenkins and George R. Jenkins are minors under the age of 21
3 years and appears by Susan L. Jenkins, their mother and guardian.

The defendant is a citizen of Ohio and resident of Cincinnati.

They further say that prior to the year 1863 their said father,

Thomas J. Jenkins, was the owner of the following-described real estate, to wit:

All those two lots of land in the city of Cincinnati, Hamilton county, in the State of Ohio, together with the improvements thereon, known as stores numbered 50 and 52 West Pearl street and being lots numbered nine and ten (9 & 10) on the plat of Eden B. Reeder's subdivision of part of inlots No. 158, 159, and 183, on the original plan of said city, said two lots forming a front of thirty-five feet seven and one-half inches on the north side of Pearl street and extending back northwardly the same width sixty-six feet in depth, more or less.

That the said Thomas J. Jenkins, while being the owner of the said two lots of ground aforesaid, joined the rebel army, and such proceedings were had in the district court of the United States within and for the southern district of Ohio in the year 1863 that said property was confiscated and the life estate of the said Thomas J. Jenkins was sold, and the said William A. Collard then or subsequently in the year 1865 and during the life of said Thomas J. Jenkins became the owner of the said life estate.

4 Plaintiffs further say the said Thomas J. Jenkins departed this life on the 1st day of August, 1872, and thereupon the plaintiffs became seized of the legal estate in said premises and entitled to the possession thereof, and defendant has since that time unlawfully kept them out of the possession thereof.

Second cause of action.—Plaintiffs say that said defendant, William A. Collard, has been in possession of the said premises and receiving the rents, issues, and profits thereof from the said first day of August, 1872, up to the commencement of this action without the consent of these plaintiffs, and has refused to account therefor.

Plaintiffs say the yearly value thereof of said premises, on the average, has been eighteen hundred dollars, and they have lost all profit and benefit from said premises since the first day of August, 1872, and are entitled to said rents, with the interest thereon, during the whole of said period, and have sustained damages by the unlawful withholding of the possession thereof by the defendant in the sum of forty thousand dollars.

Wherefore plaintiffs pray judgment against the defendant for the recovery of the possession of the said premises, and also for the said sum of forty thousand dollars, their damages so as aforesaid sustained.

S. A. MILLER,
Att'y for Plaintiffs.

5 STATE OF OHIO, }
Hamilton County, } *ss:*

Personally appeared S. A. Miller, who says on oath he is attorney for the plaintiffs in the above action; that plaintiffs are non-residents of the State of Ohio and are absent now from the said county of Hamilton, and the facts and allegations in the foregoing petition are, as he believes, true.

S. A. MILLER.

Sworn to before me and subscribed in my presence this 27th day of January, 1888.

I. J. MILLER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

Præcipe.

JULIA A. JENKINS, DUDLEY J. JENKINS, ADA GRACE Jenkins, and Albert Gallatin Jenkins, a Minor, and George R. Jenkins, a Minor, by Susan L. Jenkins, Their Guardian, Plaintiffs,
against
WILLIAM A. COLLARD, Defendant. } Præcipe.

To the clerk:

Issue summons for the recovery of the possession of real estate and for the recovery of $40,000.00 damages for its detention.

S. A. MILLER,
Att'y for Plaintiffs.

6 And afterwards, to wit, on the same day, there was issued out of the clerk's office of said court our certain summons, directed to the marshal of the district. Said summons is clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summons William A. Collard, citizen of and resident of the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the fourth Tuesday in the month of February, 1888, to answer unto Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, and Albert Gallatin Jenkins, a minor, and George R. Jenkins, a minor, by Susan L. Jenkins, their guardian, citizens of and residents in the State of West Virginia, in a civil action for the recovery of the possession of real estate and for $40,000.00 damages for its detention, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 28th day of January, A. D. 1888, and in
7 the 112th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk,*
By ROBT C. GEORGI, *Deputy.*

(Endorsed on back:)

$25.00 deposited as security for costs. Action for the recovery of the possession of real estate and the recovery of $40,000.00 damages for its detention, for which judgment may be taken unless he answer on or be—— the 4th Tuesday in the month of February, 1888

And afterwards, to wit, on the 8th day of February, A. D. 1888, came the marshal of the district to whom the aforesaid summons was in form directed and returned the same into the clerk's office of said court clothed in the words and figures following, to wit:

Received this writ on the 28th day of January, A. D. 1888, and on the 1st day of Feb., A. D. 1888, I left a copy thereof, with the endorsements thereon, at the usual place of residence of said William A. Collard.

Fees, total, $2 62.

H. C. URNER, *Marshal*,
By C. A. COSTELLO, *Deputy*.

8 And afterwards, to wit, on the 28th day of February an entry was made upon the journal of said court clothed in the words and figures following, to wit:

X, p. 551.

On motion of defendant, for reasons appearing to the court, the time for answer is this case is extended ten days.

And afterwards, to wit, on the 6th day of March, A. D. 1888, the following answer was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JULIA A. JENKINS *et al.*
vs.
WILLIAM A. COLLARD. } Answer.

Now comes the defendant and denies each and every allegation of the petition.

2nd. For a second defense the defendant says that he denies that such proceedings were had in the district court of the United States within and for the southern district of Ohio in the year 1863 or at any other time that the said property was confiscated, but defendant avers that in a proceeding instituted in said court in the year 1863 a decree was entered in the words and figures following, to wit:

9 District Court U. S., S. D. O.

THE UNITED STATES
vs.
LOTS AND STORES No. 50 & 52 PEARL ST., CINCINNATI. }.

This cause came on for hearing at this term upon the libel of information filed herein and upon the evidence in the case, and the court find that in pursuance of law the attorney of the United States for the southern district of Ohio did issue to the marshal of

said district his warrant in writing, bearing date March 9th, 1863, commanding him to seize, for the cause set forth in said warrant, all the right, title, and interest of one Thomas J. Jenkins in and to the real estate described in said warrant and in said libel of information, and that in pursuance thereof the said marshal, on the 12th day of March, 1863, seized said real estate and notified the tenants thereof and also W. A. Collard, agent of said Jenkins, of such seizure by notice in writing.

That afterwards, on the 7th day of March, 1863, a writ of monition issued out of this court under the laws thereof to said marshal, by virtue whereof the usual notice prescribed by law and by the rules of this court to all persons interested in said real estate to appear in this court on the first Tuesday of April, 1863, to assert their claims, if any they have, in said real estate, was given by said marshal, which notice was duly published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in
10 said district, for ten days from and after March 18, 1863; and all persons interested having made default and the default of all persons being duly entered and the court having heard the testimony of the witnesses proving that said Thomas J. Jenkins, of the State of Virginia, at the date of said seizure was the owner of said property, and that ever since the 17th day of July, 1862, the said Thomas J. Jenkins was and now is in the army service of the rebels, in arms against the United States, to wit, in the State of Virginia, and the court further find that the allegations in said libel are true in fact and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law for the causes set forth in said libel—

It is further ordered, sentenced, and decreed that the life estate of said Thomas J. Jenkins be, and the same is hereby, condemned as enimies' property, and that the same be appraised, advertised, and sold in the manner pointed out by the rules of this court, and that to the end the necessary process is ordered to be issued to the marshal to make sale of said real estate in the manner aforesaid, and that upon such sale he bring the proceeds into this court for distribution; and it is further ordered that the rights of all loyal people to share in such distribution are hereby reserved for further hearing.

11 Defendant says that the above was the only decree entered touching said property except the decree of confirmation of the sale and distribution of proceeds. Defendant says that thereafter such proceedings were had in such cause that there was sold and conveyed by the marshal, in accordance with said decree, the life estate of said Thomas J. Jenkins in said property to one Edward Bepler. Defendant says that by reason of the premises all the estate of said Jenking in said property was not condemned and sold, but that there remained in him the reversion or remainder in fee of said property after said life estate sold to said Bepler.

Defendant further says that after the termination of the civil war said Thomas J. Jenkins bargained and sold to the defendant, in consideration of the sum of eighteen thousand dollars paid to said

Jenkins by defendant, all the interest and estate of said Jenkins in said property, and did execute and deliver to the defendant on the 26th day of August, 1865, a deed in fee simple, with covenants of general warranty, binding himself and his heirs, and Susan L. Jenkins, wife of said Thomas J. Jenkins, did join in said deed and did release all her right and expectancy of dower in said property.

Defendant further says that on the 6th day of June, 1865, said Edward Bepler did execute and deliver to the defendant a deed for said life estate purchased by him as said sale. Defendant says that by reason of the premises he became the owner in fee simple
12 of the property and *and* entered into possession thereof and so continued to the present time.

3rd. For a third defense defendant says that on the 26th day of August, 1865, said Thomas J. Jenkins, the father of the plaintiffs, and Susan Jenkins, his wife, in consideration of the sum of eighteen thousand dollars paid by said defendant to said Thomas J. Jenkins, did execute and deliver to defendant a deed in fee simple to said property, wherein said Susan L. Jenkins did release all her right and expectancy of dower in said property and wherein said Thomas J. Jenkins, for himself and his heirs, did covenant with the defendant, his heirs and assigns, that he (the said Jenkins) was lawfully seized of said premises, and that he would forever warrant and defend the same against the lawful claims of all persons whomsoever.

Defendant says that he entered into possession of said property under said deed.

Defendant further says that at the time of said conveyance and warranty said Jenkins was a resident and citizen of the State of West Virginia, and that he continued so to be until his death, and that all his children and heirs and his wife resided in and were citizens of said State during all of said times and down to the present time.

Defendant says that said Thomas J. Jenkins died intestate on the 1st day of August, 1872, leaving a large amount of property, real and personal, in said State of West Virginia, and that by the
13 laws of said State his children, the plaintiffs herein, were his heirs, and that there descended to his said heirs, after the payment of the debts of said Thomas J. Jenkins, real estate greatly exceeding in value the value of the property herein sued for, including all the rents thereof, and greatly exceeding in value the price paid by defendant for said property, with interest thereon.

Defendant further says that at the time of said conveyance by said Jenkins to defendant, as well as at the time of the death of said Jenkins, and thence continuously to the present time there was and is in force in the State of West Virginia a statute which provides that when a deed of the alienor mentions that he and his heirs will warrant what it purports to pass or assure, if anything descends from him, his heirs shall be barred for the value of what is so descended or liable for such value.

Defendant further says that the estate of said Thomas J. Jenkins in West Virginia has been settled, the debts paid, and the residue of his estate distributed to his heirs, the plaintiffs herein.

Defendant says that by reason of the premises the plaintiffs are barred from recovery herein.

4th. For a fourth defense defendant says that by the joining of the said Susan L. Jenkins in the said deed of Thomas J. Jenkins to defendant the defendant became vested with an estate for
14&15 life of said Susan L. Jenkins in one-third of said property from and after the death of said Thomas J. Jenkins, and the defendant has made valuable and lasting improvements and paid taxes and assessments on said property exceeding in value the value of said property in the condition in which same was at the time of the conveyance to him by said Thomas J. Jenkins and his wife.

And defendant claims the benefit of the occupying claimant's act.

5th. For a fifth defense defendant says that more than 21 years have elapsed since the alleged first cause of action occurred.

6th. For a defense to the second cause of action defendant repeats the foregoing defenses and asks that all the allegations therein contained be taken as part hereof as if herein specifically repeated.

7th. For a second defense to the second cause of action defendant says that he denies that the yearly value of said premises has been since August 1st, 1872, on the average of eighteen hundred dollars.

8th. For a third defense to the second cause of action defendant says that more than six years have elapsed since said alleged cause of action occurred.

9th. For a fourth defense to the second cause of action defendant says that more than four years have elapsed since said alleged cause of action occurred.

HEALY & BRANNUM,
Defendant's Att'ys.

16 STATE OF OHIO, }
Hamilton County, } *ss:*

William A. Collard, being duly sworn, says that he is the defendant above named, and that the facts stated in the foregoing answer are true as he verily believes.

WM. A. COLLARD.

Sworn to and signed before me this 5th day of March, 1888.

CHAS. H. JONES,
[SEAL.] *N. P., Ham. Co., O.*

And afterwards, to wit, on the 12th day of March, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

Circuit Court of the U. S., Southern District of Ohio.

JULIA H. JENKINS *et al.*
vs.
WILLIAM A. COLLARD. } No. 4109. Demurrer.

1. The plaintiffs now come and demur to the second, third, fourth, fifth, sixth, seventh, eighth, and ninth defenses set forth in the answer of defendant.

2. And for the ground of their demurrer to the said second defense set forth in the answer say it constitutes no defense and
17 is insufficient in law on its face.

3. For the ground of their demurrer to the said 3rd defense set forth in the answer say the allegations set forth constitute no defense and are insufficient in law on the face.

4. For the ground of their demurrer to the said fourth defense set forth in the answer say the allegations constitute no defense and are insufficient in law on the face.

5. For the ground of their demurrer to the said fifth defense set forth in the answer say it constitutes no defense and is insufficient in law on the face.

6. For the ground of their demurrer to the said sixth defense set forth in the answer say it constitutes no defense and is insufficient in law on the face.

7. For the ground of their demurrer to the said seventh defense set forth in the answer say it constitutes no defense and is insufficient in law on its face.

8. For the ground of their demurrer to the eighth defense set forth in the answer say it constitutes no defense and is insufficient in law on its face.

9. For the ground of their demurrer to the ninth defense set forth in the answer say it constitutes no defense and is insufficient in law on its face.

S. A. MILLER,
Att'y for Plaintiffs.

18 And afterwards, to wit, on the 12th day of May, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Y, p. 2.

This cause came on to be heard upon the demurrer of plaintiffs to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th defenses set forth in the answer of defendant; on consideration whereof the court overrules the same as to each and all of said defenses; to the overruling of which demurrer the plaintiffs except.

And on application the plaintiffs are allowed to file *to file* a reply to the said defenses.

And afterwards, to wit, on the 12th day of May, A. D. 1888, the following reply was filed *filed* in the clerk's office of said court, clothed in the words and figures following, to wit:

Reply.

Circuit Court of the United States, Southern District of Ohio.

JULIA H. JENKINS *et al.*, Plaintiffs,
vs.
WILLIAM A. COLLARD, Defendant.

1st. Now comes the plaintiffs, and for reply to the second defense set forth in defendant's answer say that by the proceedings
19 in the district court of the United States within and for the southern district of Ohio in the year 1863 all the estate of Thomas J. Jenkins in the property was confiscated and sold and there did not remain in him the reversion or remainder in fee after the sale to Bepler.

Plaintiffs admit the execution of a deed to the defendant on the 26th day of August, 1865, by the said Thomas J. Jenkins, which deed was executed and delivered at Cincinnati, in the State of Ohio; but plaintiffs deny that said Thomas J. Jenkins had any interest in said property at that time which he could convey, and aver that defendant took nothing by said deed from Thomas J. Jenkins.

2nd. Plaintiffs, for reply to the third defense set forth in defendant's answer, say the deed from Thomas J. Jenkins and wife to the defendant was executed and delivered at Cincinnati, in the State of Ohio, and the laws of West Virginia have no effect upon or control over such conveyance, and plaintiffs deny there is any such law in West Virginia having the force and effect set forth in the said defense.

3rd. Plaintiffs, for reply to the 4th, 5th, 6th, 7th, 8th, and 9th defenses set forth in defendant's answer, deny each and every allegation therein contained.

S. A. MILLER,
Att'y for Plaintiffs.

STATE OF OHIO, *Hamilton County,* } *ss:*

20 Personally appeared S. A. Miller, who says, on oath, he is the attorney for the plaintiffs in the above-entitled action; that plaintiffs are non-residents of the State of Ohio and are now absent from said county of Hamilton, and the facts and allegations in the foregoing reply are, as he believes, true.

S. A. MILLER.

Sworn to before me and signed in my presence this 12th day of May, A. D. 1888.

A. L. HERRLINGER,
Notary Public, Hamilton County, Ohio.

[SEAL.]

And afterwards, to wit, on the 10th day of October, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, Southern District of Ohio.

JULIA H. JENKINS *et al.*, Plaintiffs,
vs.
WILLIAM A. COLLARD, Defendant. } No. 4109. Demurrer.

Now comes the defendant and demurs to the first and second paragraphs of the reply.

HEALY & BRANNAN,
Def't's Att'ys.

21 And afterwards, to wit, on the 25th day of Nov., A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 124.

It appearing to the court that the entry hereinbefore made overruling the demurrer of the plaintiffs to the answer of the defendant is not in accordance with the ruling made by the court, the same is hereby modified as follows:

The court overrules the demurrer to the second defense and sustains the demurrer to the 3rd, 4th, 5th, 6th, 7th, 8th, and 9th defenses set forth in the said answer; to the overruling of which demurrer to the second defense the plaintiffs except; to each of the other defenses set up in the answer the defendant excepts.

And afterwards, to wit, on the 25th day of Nov., A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 124.

This cause now coming on to be heard upon the demurrer of the defendant to the reply of the plaintiffs to the second defense set forth in the defendant's answer (the reply to the other defenses, by consent, being withdrawn, as the demurrer was sustained thereto), on consideration whereof the court sustains the same; to which the plaintiffs except.

22 And thereupon, on application of defendant and by consent of all the parties, leave is granted to the defendant to withdraw the first defense set forth in the answer of the defendant, and the same is accordingly withdrawn.

And thereupon, the plaintiffs not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiffs his costs herein expended, taxed at $—; to all of which the plaintiffs except.

And afterwards, to wit, on the 25th day of Nov., A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

Circuit Court of the United States for the Southern District of Ohio.

JULIA H. JENKINS *et al.*, Plaintiffs,
vs.
WILLIAM A. COLLARD, Defendant. } No. 4109. Motion for New Trial.

Now comes the plaintiffs and move the court to set aside the judgment and for a new trial for the following causes:

1. That the decision of the court is not sustained by sufficient evidence.

2. That the decision of the court is contrary to law.

S. A. MILLER,
Att'y for Plaintiffs.

23 And afterwards, to wit, on the 27th day of November, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 125.

This cause being heard on the motion of the plaintiffs to set aside the judgment and for a new trial, the court, on consideration, overrules the same; to which the plaintiffs except.

And afterwards, to wit, on the 27th day of November, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 127.

And now comes the said Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, and Albert Gallatin Jenkins, a minor, and George R. Jenkins, a minor, by Susan L. Jenkins, their guardian, and presented their bill of exceptions taken on the trial of this cause, and the same is allowed, signed, sealed, and ordered to be placed on file with the pleadings and made a part of the record in this case, and the bond for costs on the writ of error is fixed at five hundred ($500) dollars.

And afterwards, to wit, on the 27th day of Nov., A. D. 1888, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

24 *Bill of Exceptions.*

Circuit Court of the United States for the Southern District of Ohio, Western Division.

JULIA H. JENKINS, DUDLEY J. JENKINS, ADA GRACE Jenkins, and Albert Gallatin Jenkins, a Minor, and George R. Jenkins, a Minor, by Susan L. Jenkins, Their Guardian, Plaintiffs,
against
WILLIAM A. COLLARD, Defendant. } No. 4109.

Be it remembered that this cause came on to be heard in the circuit court of the United States for the southern district of Ohio at the April term thereof, A. D. 1888, upon the demurrer of the plaintiffs to the second defense set forth in defendant's answer.

Petition.

The petition of the plaintiffs set forth as follows to wit:

"First cause of action. Plaintiffs say that they, Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, Albert Gallatin Jenkins, and George R. Jenkins, are citizens and residents of Cabell county, in the State of West Virginia, and are the children and only
25 heirs of Thomas J. Jenkins, deceased, and that Albert Gallatin Jenkins and George R. Jenkins are minors under the age of 21 years and appear by Susan L. Jenkins, their mother and guardian.

The defendant is a citizen of Ohio, resident in Cincinnati.

They further say that prior to the year 1863 their said father, Thomas J. Jenkins, was the owner of the following-described real estate, to wit: All those lots of land in the city of Cincinnati, Hamilton county, in the State of Ohio, together with the improvements thereon, known as stores No. 50 & 52 West Pearl street, and being lots numbered nine and ten (9 & 10) on the plat of Eden B. Reeder's subdivision of part of inlots No. 158, 159, and 183 on the original plan of said city, said two lots forming a front of thirty-five feet seven and one-half inches on the north side of Pearl street and extend- back northwardly the same width sixty feet in depth, more or less.

That the said Thomas J. Jenkins, while being the owner of the said two lots of ground aforesaid, joined the rebel army, and such proceedings were had in the district court of the United States within and for the southern district of Ohio in the year 1863 that said property was confiscated and the life estate of the said Thomas J. Jenkins was sold and the said defendant, William A. Collard, then or subsequently, in the year 1865, and during the life of
26 said Thomas J. Jenkins, became the owner of the said life estate.

Plaintiffs further say the said Thomas J. Jenkins departed this life on the 1st day of August, 1872, and thereupon the plaintiffs be

came seized of the legal estate in said premises and entitled to the possession thereof and defendant has since that time unlawfully kept them out of the possession thereof.

Second cause of action. Plaintiffs say that said defendant, William A. Collard, has been in possession of the said premises and receiving the rents, issues, and profits thereof from the first day of August, 1872, up to the commencement of this action without the consent of these plaintiffs and has refused to account therefor.

Plaintiffs say the yearly value thereof of said premises on the average has been eighteen hundred dollars, and they have lost all profit and benefit from said premises since the 1st day of August, 1872, and are entitled to said rents, with the interest thereon, during the whole of said period, and have sustained damages by the unlawful withholding of the possession thereof by the defendant in the sum of forty thousand dollars.

Wherefore plaintiffs pray judgment against the defendant for the recovery of the possession of the said premises and also for the said sum of forty thousand dollars, their damages so as aforesaid sustained."

To this the defendant answered as follows:

Answer.

27 "For a second defense the defendant says that he denies that such proceedings were had in the district court of the United States within and for the southern district of Ohio, in the year 1863 or at any other time, that the said property was confiscated, but defendant avers that in a proceeding instituted in said court in the year 1863 a decree was entered in the words and figures following, to wit:

'District Court U. S., S. D. O.

THE UNITED STATES
vs.
LOTS AND STORES No. 50 & 52 PEARL ST., CINCINNATI.

This cause came on for hearing at this term upon the libel of information filed herein and upon the evidence in the case, and the court find that in pursuance of law the attorney of the United States for the southern district of Ohio did issue to the marshal of said district his warrant in writing, bearing date March 9th, 1863, commanding him to seize for the cause set forth in said warrant all the right, title, and interest of one Thomas J. Jenkins in and to the real estate described in said warrant and in said libel of information, and that in pursuance thereof the said marshal on the 12th day of March, 1863, seized said real estate and notified the tenants thereof and also W. A. Collard, agent of said Jenkins, of such seizure by notice in writing.

28 That afterwards, on the 7th day of March, 1863, a writ of monition issued out of this court, under the laws thereof, to said marshal, by virtue whereof the usual notice prescribed by law

and by the rules of this court to all persons interested in said real estate to appear in this court on the first Tuesday of April, 1863, to assert their claims, if any they have, in said real estate was given by said marshal; which notice was duly published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in said district, for ten days from and after March 18th, 1863, and all persons interested having made default, and the default of all persons being duly entered, and the court having heard the testimony of the witnesses proving that said Thomas J. Jenkins, of the State of Virginia, at the date of said seizure was the owner of said property, and that ever since the 17th day of July, 1862, the said Thomas J. Jenkins was and now is in the army service of the rebels in arms against the United States, to wit, in the State of Virginia, and the court further find that the allegations in said libel are true in fact, and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law for the causes set forth in said libel.

It is further ordered, sentanced, and decreed that the life estate of said Thomas J. Jenkins be, and the same is hereby, con-
29 demned as enemies' property, and *and* that the same be appraised, advertised, and sold in the manner pointed out by the rules of this court, and that to that end the necessary process is ordered to be issued to the marshal to make sale of said real estate in the manner aforesaid, and that upon such sale he bring the proceeds into this court for distribution; and it is further ordered that the rights of all loyal people to share in such distribution are hereby reserved for further hearing.'

Defendant says that the above was the only decree touching said property, except the decree of confirmation of the sale and distribution of proceeds.

Defendant says that thereafter such proceedings were had in said cause that there was sold and conveyed by the marshal, in accordance with said decree, the life estate of said Thomas J. Jenkins to one Edward Bepler.

Defendant says that by reason of the premises all the estate of said Jenkins in said property was not condemned and sold, but that there remained in him the re- or remainder in fee of said property after said life estate sold to said Bepler. Defendant further says that after the termination of the civil war said Thomas J. Jenkins bar-
gained and sold to the defendant, in consideration of the sum
30 of eighteen thousand dollars paid to said Jenkins by defendant, all the interest and estate of said Jenkins in said property, and did execute and deliver to the defendant, on the 26th day of August, 1865, a deed in fee simple, with covenants of general warranty, binding himself and his heirs, and Susan L. Jenkins, wife of said Thomas J. Jenkins, did join in said deed and did release all her right and expectancy of dower in said property.

Defendant further says that on the 6th day of June, 1865, said Edward Bepler did execute and deliver to the defendant a deed for said life estate purchased by him at said sale. Defendant says that by reason of the premises he became the owner in fee simple of the

property and entered into possession thereof and so continued to the present time."

Demurrer.

The plaintiffs demurred to the said defense on the ground that it constituted no defense and is insufficient in law on its face; and plaintiffs claimed and asked the court to hold that by the decree set up in said defense there was an adjudicated forfeiture and sale of the lots described under the confiscation act of Congress of July 17, 1862, and the joint resolution of even date therewith, and there was not left in Thomas J. Jenkins any interest which he could convey by deed, but that all which could become the property of the United States and could be sold by virtue of a decree of condemnation and order of sale was the life estate of Thomas J. Jenkins, and
31 that a decree condemning the fee could have no greater effect than to subject the life estate to sale, and therefore the deed executed and delivered on the 26th day of August, 1865, was a nullity, and the plaintiffs inherited and were entitled to the property as prayed for in their petition.

Judgment.

But the court decided and adjudged that by reason of said decree all the estate of said Thomas J. Jenkins in said property was not condemned and sold, but only a technical life estate therein, and that there remained in Thomas J. Jenkins the reversion or remainder in fee of said property after the termination of his said life estate sold to said Bepler, which he could sell and convey by deed and which he did sell and convey by the deed of August 26th, 1865, and consequently the plaintiffs had not inherited any interest in the property, and on consideration the court overruled the said demurrer; to which the plaintiffs then and there excepted, as shown by the journal entry; which exception was then and there allowed.

The plaintiff had leave of court to reply, and thereupon replied as follows:

Reply.

"Now come the plaintiffs and, for reply to the second defense set forth in defendant's answer, say that by the proceedings in the district court of the United States within and for the southern
32 district of Ohio in the year 1863 all the estate of Thomas J. Jenkins in the property was confiscated and sold, and there did not remain in him the reversion or remainder in fee after the sale to Bepler.

Plaintiffs admit the execution of a deed to the defendant on the 26th day of August, 1865, by the said Thomas J. Jenkins, which deed was executed and delivered at Cincinnati, in the State of Ohio, but plaintiffs deny that said Thomas J. Jenkins had any interest in said property at that time which he could convey, and aver that defendant took nothing by said deed from Thomas J. Jenkins."

Demurrer.

To which reply the defendant demurrer, and the cause came on to be heard in the circuit court of the United States for the southern district of Ohio, at the October term thereof, A. D. 1888, upon the said demurrer to the reply.

And the plaintiffs claimed and asked the court to hold that this was a good and sufficient reply to the said defense and to the operation of the decree set up in the said defendant's answer for the same reasons they had asked the court to sustain their demurrer to defendant's answer aforesaid.

Judgment.

But the court held the demurrer to the reply was well taken,
33 because only the technical life estate of Thomas J. Jenkins was confiscated by the said decree, and there was left in him the reversion or remainder, which he sold and conveyed to the defendant by the deed of August 26th, 1865, and consequently the plaintiffs had no interest in the property, and on consideration the court sustained the demurrer; to which the plaintiffs then and there excepted, as shown by the journal entry; which exception was then and there allowed.

Judgment.

And plaintiffs not desiring to plead further, the court gave judgment for the defendant for the reasons above set forth in overruling the demurrer of plaintiffs to the second defense in the defendant's answer; to which action of the court the plaintiffs then and there excepted; which exception was then and there allowed, as shown by the journal entry; and thereupon the plaintiffs filed their written motion to set aside the said judgment and for a new trial on the ground of the errors above complained of; which motion the court overruled, and to the overruling of which motion the plaintiffs then and there excepted.

And thereupon the plaintiffs prayed that this their bill of exceptions in that behalf might be allowed, signed, sealed, filed, and made part of the record, which is accordingly done.

[SEAL.] GEO. R. SAGE,
U. S. District Judge, S. D. O., Sitting in and Holding U. S. Circuit Court, S. D. O., in Above-Entitled Cause.

34 And afterwards, to wit, on the 28th day of November, A. D. 1888, the following error bond was filed in the *the* clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond.

35 Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JULIA H. JENKINS *et al.*
vs.
WILLIAM A. COLLARD.

Know all men by these presents that we, Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, and Albert Gallatin Jenkins, a minor, & George R. Jenkins, a minor, by Susan L. Jenkins, their guardian, as principals, and Isaac J. Miller, as surety, are held and firmly bound unto William A. Collard in the sum of five hundred dollars, to be paid to the said William A. Collard, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 28th day of November, 1888.

Whereas the above-named Julia H. Jenkins and others as aforesaid have taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Julia H. Jenkins & others as aforesaid shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

ISAAC J. MILLER. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
ROBT C. GEORGI.
B. E. DILLEY.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio.

35½ SOUTHERN DISTRICT OF OHIO, *ss:*

I, Isaac J. Miller, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

ISAAC J. MILLER.

Sworn to before me the 28th day of November, 1888.

[SEAL.] ROBT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

36 And afterwards, to wit, on the 28th day of November, A. D. 1888, the following assignment of errors and prayer for reversal was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Assignment of Errors and Prayer for Reversal.

Supreme Court of the United States.

JULIA H. JENKINS, DUDLEY J. JENKINS, ADA GRACE JENKINS, and Albert Gallatin Jenkins, a Minor, and George R. Jenkins, a Minor, by Susan L. Jenkins, Their Guardian, Plaintiffs in Error,

against

WILLIAM A. COLLARD, Defendant in Error.

Assignment of errors and prayer for reversal.

Now come the said Julia H. Jenkins, Dudley J. Jenkins, Ada Grace Jenkins, and Albert Gallatin Jenjins, a minor, and George R. Jenkins, a minor, by Susan L. Jenkins, their guardian, plaintiffs in error, and for an assignment of errors herein say:

1. That at the April term, A. D. 1888, of the circuit court of the United States for the southern district of Ohio, in a certain cause therein pending, wherein they were the plaintiffs and William
37 A. Collard was defendant, on the hearing of a demurrer of the plaintiffs to the second defense set forth in the defendant's answ-r, a judgment and order were entered in favor of said defendant and against the said plaintiffs overruling the said demurrer.

2. Said plaintiffs in error further represent that at the October term, A. D. 1888, of the said circuit court, on the hearing of a demurrer of the defendant to the reply of the plaintiffs in said action, a judgment and order were entered sustaining said demurrer and in favor of said defendant and against the said plaintiffs.

3. Said plaintiffs in error further represent that at the said October term, A. D. 1888, of the said circuit court, the plaintiffs not desiring to further plead, a judgment and order were entered in favor of said defendant, William A. Collard, and against the said plaintiffs, whereby the said plaintiffs have been deprived of two valuable lots of land on West Pearl street, in Cincinnati, in the State of Ohio, with the two stores thereon, and $40,000 which the defendant owes to plaintiffs for the rents collected thereon since the 1st day of August, 1872, and whereby the plaintiffs, in addition thereto, are required to pay costs of the court.

4. Said plaintiffs in error further represent that at the October term, A. D. 1888, of the said circuit court a judgment and order were entered in favor of the said defendant, William A. Col-
38 lard, and against the said *said* plaintiffs, overruling a motion to set aside the said judgments and for a new trial.

And the said plaintiffs in error say that in rendering each of said

judgments and orders errors intervened to their prejudice, as will appear by the said record.

That a decree set up in defendant's answer was a good and valid decree adjudicating a forfeiture and sale of the lots and stores under the confiscation act of Congress of July 17th and the joint resolution of even date therewith, and there was not left in Thomas J. Jenkins any interest in said property which he could convey by deed.

But, on the contrary, the remainder of the property after the termination of the life estate was withheld from the confiscation exclusively for the benefit of the heirs.

That as to Thomas J. Jenkins the forfeiture was complete and absolute and the property was placed beyond his control while living, but the ownership after his death was in nowise affected and the property descended to his heirs, who are the plaintiffs in this action and in whose favor the judgments should have been rendered.

Wherefore the plaintiffs in error pray that said judgments and orders may be reversed; that they may be restored to their rights in the premises, and for all other and further relief to which they may be entitled in law or equity.

S. A. MILLER,
Att'y for Plaintiffs in Error.

39 *Certificate.*

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 30th day of November, A. D. 1888.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

40 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Julia H. Jenkins *et al.* and William A. Collard, a manifest error hath happened, to the great damage of the said Julia H. Jenkins *et al.*, as by their complaint appears, we, being willing

that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of November, 1888, in the year of our Lord one thousand eight hundred and eighty-eight.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

41 [Endorsed:] United States circuit court, S. D. O., W. D. No. 4109. Julia H. Jenkins *et al. vs.* Wm. A. Collard. Writ of error. Filed ——, 18—. —— ——, clerk.

42 THE UNITED STATES OF AMERICA, *ss:*

To William A. Collard, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Julia H. Jenkins and others are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

GEO. R. SAGE,
U. S. District Judge within and for the Southern Dist. of Ohio, Holding and Sitting as Circuit Judge in Above-Entitled Cause, there Being no Associate Justice or Circuit Judge Present in the District.

43 [Endorsed:] 70. 11, 28, '88. United States circuit court, S. D. O., W. D. No. 4109. Julia H. Jenkins *et al. vs.* William A. Collard. Citation to defendant in error. Filed —— —, 18—. —— ——, clerk.

Received this writ at Cincinnati, Ohio, on the 28th day of November, 1888, and on the 30th day of November, 1888, at said Cincinnati, Ohio, I served the within-named William A. Collard with a true copy of this writ, having all the endorsements thereon, left at his residence with an adult member of his family.

H. C. URNER,
U. S. Marshal,
By C. A. COSTELLO, *Deputy.*

Service	2 00
1 copy	50
2 miles	12
	$2 62

Endorsed on cover: Case No. 13,469. S. Ohio C. C. U. S. No. 316. Julia H. Jenkins *et al.*, plaintiffs in error, *vs.* William A. Collard. Filed January 4, 1889.

RECORD CASE NO. 10,409.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891, TERM NO. 316.

JULIA H. JENKINS *et al.*, *Plaintiffs in Error*,

vs.

WILLIAM A. COLLARD, *Defendant in Error*.

In Error to the Circuit Court of the United States, for the Southern District of Ohio.

Brief for Plaintiffs in Error, by S. A. Miller, Attorney.

Printed by JAMES KOCH, 511 Main St., Stockton Building, Cincinnati, O.

RECORD CASE NO. 13,469.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891, TERM NO. 316.

JULIA H. JENKINS *et al.*, *Plaintiffs in Error,*
vs.
WILLIAM A. COLLARD, *Defendant in Error.*

In Error to the Circuit Court of the United States, for the Southern District of Ohio.

Brief for Plaintiffs in Error, by S. A. Miller, Attorney.

STATEMENT OF THE CASE.

The plaintiffs are the children and only heirs of Thomas J. Jenkins, deceased. Thomas J. Jenkins was the owner of two lots of land, in Cincinnati, and while such owner he joined the rebel army, and proceedings were taken in the District Court of the United States within and for the Southern District of Ohio, in the year 1863, by which the said property was confiscated.

The essential part of the decree in the action in the District Court of the United States is as follows:

"THE UNITED STATES
vs.
LOTS AND STORES NOS. 50 & 52 PEARL STREET, CINCINNATI.

"This cause came on for hearing at this term upon the libel of information filed herein, and upon the evidence in the case, and the court find that in pursuance of law the

Attorney of the United States for the Southern District of Ohio, did issue to the marshal of said district his warrant in writing, bearing date March 9th, 1863, commanding him to seize, for the cause set forth in said warrant, all the right, title, and interest of one Thomas J. Jenkins in and to the real estate described in said warrant, and in said libel of information, and that in pursuance thereof the said marshal, on the 12th day of March, 1863, seized said real estate and notified the tenants thereof, and also W. A. Collard, agent of said Jenkins, of such seizure by notice in writing.

"That afterwards, on the 7th day of March, 1863, a writ of monition issued out of this court under the laws thereof to said marshal, by virtue whereof the usual notice prescribed by law, and by the rules of this court, to all persons interested in said real estate to appear in this court on the first Tuesday of April, 1863, to assert their claims, if any they have, in said real estate, was given by said marshal; which notice was duly published in the Cincinnati Daily *Gazette*, a newspaper printed and of general circulation in said district, for ten days from and after March 18th, 1863; and all persons interested having made default, and the default of all persons being duly entered, and the court having heard the testimony of the witnesses proving that said Thomas J. Jenkins, of the state of Virginia, at the date of said seizure was the owner of said property, and that ever since the 17th day of July, 1862, the said Thomas J. Jenkins was and now is in the army service of the rebels, in arms against the United States, to-wit, in the state of Virginia, and the court further find, that the allegations in said libel are true in fact, and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law for the causes set forth in said libel.

"It is further ordered, sentenced and decreed that the

life estate of said Thomas J. Jenkins be, and the same is hereby condemned as enemies' property, and that the same be appraised, advertised, and sold in the manner pointed out by the rules of this court, and that to that end the necessary process is ordered to be issued to the marshal to make sale of said real estate in the manner aforesaid, and that upon such sale he bring the proceeds into this court for distribution; and it is further ordered that the rights of all loyal people to share in such distribution are hereby reserved for further hearing."

After such decree the property was sold, and a decree of confirmation of sale, and distribution of proceeds was duly entered. The property was sold to one Bepler, who conveyed to Wm. A. Collard, defendant in error.

After the termination of the civil war the said Thomas J. Jenkins executed and delivered to the said defendant, Wm. A. Collard, a deed in fee simple of the said premises.

Thomas J. Jenkins died on the first day of August, 1872.

The above decree in the District Court of the United States is set out in the answer of the defendant, claiming that by reason of the premises all the estate of said Thomas J. Jenkins in said property was not condemned and sold, but that there remained in him the reversion or remainder in fee of said property after said life estate sold to said Bepler.

A demurrer to the said answer was overruled, exceptions taken, and a reply filed claiming:

"That by the proceedings in the district court of the United States within and for the southern district of Ohio, in the year 1863, all the estate of Thomas J. Jenkins in the property was confiscated and sold, and there did not remain

in him the reversion or remainder in fee after the sale to Bepler."

A demurrer to this reply was sustained, exceptions taken, and judgment for defendant, exceptions taken, motion for new trial overruled, and exceptions taken.

The Circuit Court "decided and adjudged that by reason of said decree all the estate of said Thomas J. Jenkins in said property was not condemned and sold, but only a technical life estate therein, and that there remained in Thomas J. Jenkins the reversion or remainder in fee of said property after the termination of his said life estate sold to said Bepler, which he could sell and convey by deed, and which he did sell and convey by the deed of August 26th, 1865, and consequently the plaintiffs had not inherited any interest in the property."

ERRORS OF THE CIRCUIT COURT COMPLAINED OF.

The plaintiffs in error claim the decisions and judgment of the Circuit Court were wholly erroneous. They claim the decree set up in defendant's answer was a good and valid decree, adjudicating a forfeiture and sale of the lots and stores under the Confiscation Act of Congress, of July 17, 1862, and the Joint Resolution of even date therewith, and there was not left in Thomas J. Jenkins any interest in said property which he could convey by deed. But, on the contrary, the remainder of the property after the termination of the life estate was withheld from the confiscation exclusively for the benefit of the heirs. That as to Thomas J. Jenkins, the forfeiture was complete and absolute, and the property was placed beyond his control while living, but the ownership after his death was in no wise affected

and the property descended to his heirs, who are the plaintiffs in this action, and in whose favor the decisions and judgment should have been rendered.

THE LAW OF CONFISCATION.

If the position taken by the Circuit Court is correct, Thomas J. Jenkins could have sold and conveyed the property, in fee simple, at any time during the proceedings for confiscation in the District Court of the United States, or at any time afterward, while the Civil War was in progress, as well as he could after the war terminated. He might have sold the fee simple of the property and used the proceeds to wage war against the United States. The confiscation proceedings were void, or practically a nullity in disabling the enemy. And what is of even more significance, if the Circuit Court is not in error, is that such a judgment and decree can be collaterally attacked and defeated. We think, however, that the confiscation proceedings were valid, and they can not be collaterally impeached, nor will any error be regarded that does not go to the extent of showing a want of jurisdiction in the District Court to enter any decree whatever in the case for confiscation.

The syllabus in Wallach *vs.* Van Riswick, 92 U. S., 202, is as follows:

"1. After an adjudicated forfeiture and sale of an enemy's land, under the Confiscation Act of Congress, of July 17, 1862, and the Joint Resolution of even date therewith, THERE IS NOT LEFT IN HIM ANY INTEREST WHICH HE CAN CONVEY BY DEED."

"2. The Joint Resolution was intended FOR THE BENEFIT OF HIS HEIRS EXCLUSIVELY, to enable them to take the inheritance after his death."

The court in deciding the case said :

"The main question raised by the demurrer, and that which has been principally argued, is, WHETHER after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress, of July, 17, 1862, 12 Stat. at L., 589, and the Joint Resolution of even date therewith, THERE IS LEFT IN HIM ANY INTEREST WHICH HE CAN CONVEY BY DEED."

"The Act of July 17, 1862, is an Act for the confiscation of enemies' property. ITS PURPOSE, as well as its justification, WAS to strengthen the government, and TO ENFEEBLE THE PUBLIC ENEMY BY TAKING FROM THE ADHERENTS OF THAT ENEMY THE POWER TO USE THAT PROPERTY IN AID OF THE HOSTILE CAUSE. Miller *vs.* U. S., 11 Wall., 268 (78 U. S., XX., 135). With such a purpose, IT IS INCREDIBLE THAT CONGRESS, WHILE PROVIDING FOR THE CONFISCATION OF AN ENEMY'S LAND, INTENDED TO LEAVE IN THAT ENEMY A VESTED INTEREST THEREIN, WHICH HE MIGHT SELL, AND WITH THE PROCEEDS OF WHICH HE MIGHT AID IN CARRYING ON WAR AGAINST THE GOVERNMENT. The statute indicates no such intention. The contrary is plainly manifested. The fifth section enacted that it should be the duty of the President of the United States to cause the seizure of 'all the estate and property, money, stocks, credits and effects' of the persons therein described, of whom Charles S. Wallach was one, and to apply the same, and the proceeds thereof, to the support of the army of the United States; and it declared that all sales, transfers and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. IT COVERED THE ESTATE OF THE OWNER; ALL HIS ESTATE OR OWNERSHIP. NO AUTHORITY IS GIVEN TO SEIZE LESS THAN THE WHOLE. The seventh section of the Act enacted that, to secure the sale and condemnation of any such property, viz: the property seized, so that it

might be made available for the purposes aforesaid, proceedings should be instituted in a court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the court should decree, the proceeds to be paid into the Treasury of the United States for the purpose aforesaid. NOTHING CAN BE PLAINER THAN THAT THE CONDEMNATION AND SALE OF THE IDENTICAL PROPERTY SEIZED WERE INTENDED BY CONGRESS; AND IT WAS EXPRESSLY DECLARED THAT THE SEIZURE ORDERED SHOULD BE OF ALL THE ESTATE AND PROPERTY OF THE PERSONS DESIGNATED IN THE ACT. If, therefore, the question before us were to be answered in view of the proper construction of the Act of July 17, 1862, alone, there could be no doubt that the seizure, condemnation and sale of Charles S. Wallach's estate, in the lot in controversy, left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. This we understand to be substantially conceded on behalf of the defendant.

"But the Act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval, a Joint Resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that 'no proceedings under said Act shall be so construed as to work a forfeiture of the real estate of the offender BEYOND HIS NATURAL LIFE.' The Act and the Joint Resolution are, doubtless, to be construed as one Act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the Resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any for-

feiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in Section 3, Article 3, that 'no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.' It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited, or to the extent and efficacy of the forfeiture while it continued. It was to meet the doubt which did exist that the Resolution was adopted. What, then, is its effect? And what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the Act of which it is substantially a part; for its object was to defeat, not to qualify. The purpose as we have said was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy.

"But that purpose was thwarted, partially at least, by the Resolution, if it meant to leave a portion, and often much the larger portion of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the termination of a life estate which he could sell and convey, his power to aid the public enemy remained. It can not be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation and sale with the particular estate that preceded it. It is to be observed that the Joint Resolution made no attempt to divide the estate confiscated into one for life, and another in fee. It did not say that the forfeiture shall be of a life estate only, or of the possession and enjoyment of the property for life. Its language is, 'No proceedings shall work a forfeiture BEYOND

THE LIFE OF THE OFFENDER;' NOT BEYOND THE LIFE ESTATE OF THE OFFENDER. THE OBVIOUS MEANING IS, THAT THE PROCEEDINGS FOR CONDEMNATION AND SALE SHALL NOT AFFECT THE OWNERSHIP OF THE PROPERTY AFTER THE TERMINATION OF THE OFFENDER'S NATURAL LIFE. After his death, the land shall pass or be owned as if it had not been forfeited. There is nothing that warrants the belief it was intended, that, while the forfeiture lasts, it should not be complete, viz: a devolution upon the United States of the offender's entire right. The words of the Resolution are not exactly those of the Constitutional Ordinance; but both have the same meaning, and both seek to limit the extent of forfeitures.

"In adopting the Resolution, Congress manifestly had the constitutional ordinance in view; and there is no reason why one should receive a construction different from that given to the other. What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood, and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, EXCEPT DURING THE LIFE OF THE PERSON ATTAINTED. NO ONE EVER DOUBTED THAT IT WAS A PROVISION INTRODUCED FOR THE BENEFIT OF THE CHILDREN AND HEIRS ALONE; A DECLARATION THAT THE CHILDREN SHOULD NOT BEAR THE INIQUITY OF THE FATHERS. Its purpose has never been thought to be a benefit to the traitor by leaving in him a vested interest in the subject of forfeiture."

After commenting on English cases, the court continues:

"Certainly no case has been found, none, we think, has

ever existed, in which it has been held that either statute intended to leave in the offender an ULTERIOR ESTATE IN FEE AFTER A FORFEITED LIFE ESTATE, OR ANY INTEREST WHATEVER SUBJECT TO HIS DISPOSING POWER."

After discussing the effect of a forfeiture in England, the court continues:

"If a FORFEITURE is equivalent to a grant or conveyance to the government, how can anything remain in the person whose estate has been FORFEITED WHICH HE CAN CONVEY TO ANOTHER? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our act of 1862 and the Joint Resolution. If in the British Statute the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes."

And again:

"It has not been found necessary in England to hold that a reversion remained in a traitor after his attaint, though the statutes declared that the forfeiture shall be DURING HIS NATURAL LIFE ONLY."

The decree, in the District Court for the Southern District of Ohio, condemning and ordering the sale of the Jenkins property above set forth, is more formal and better drawn than it was in the case of United States *vs.* Charles S. Wallach, in the District of Columbia, which was passed upon in Wallach *vs.* Van Riswick, 92 U. S., 202, and the particular words used in forfeiting and selling the interest of defendants in the two cases are very much alike. In the Jenkins case the court found that, in pursuance of law, the warrant issued, and the court seized all the right, title, and interest of Thomas J. Jenkins in the real estate, and

gave the notice prescribed by law and the rules of court to all persons interested in the real estate, and all such persons being in default, and it being proven that Thomas J. Jenkins was in the army service of the rebels, in arms against the United States, "The court finds that the allegations in said libel are true, and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law for the causes set forth in said libel. It is further ordered, sentenced and decreed that the life estate of said Thomas J. Jenkins be and the same is hereby condemned as enemy's property, and that the same be appraised, advertised and sold in the manner pointed out by the rules of this court," etc.

All the interest of Jenkins, in the real estate, was seized and his life estate was forfeited, condemned and sold in pursuance of law.

In the case of the United States *vs.* Charles S. Wallach, there was no finding that a warrant had issued, and that the property had been seized; there was no finding that any notice had been given to parties interested in the property; there was no finding that any testimony was presented to the court showing the defendant was in the army service of the rebels, and that the allegations in the libel were true. But the whole substance of the decree is in these words:

"After considering the papers and pleadings filed with the above entitled cause, and due deliberation in the premises, it is ordered, sentenced and decreed, that all the right, title, interest and estate of the said Charles S. Wallach in and to the said real estate be forfeited and condemned to

the United States, for and during the life of the said Charles S. Wallach. . . . And that the marshal of the United States for the District of Columbia proceed to sell said interest at public auction," etc.

(See record of case, and the entry on 29th of July, 1863, Confiscation Case No. 10, Doc. 1.)

In brief, the interest of Wallach in the real estate was forfeited and condemned for and during his life, and that interest was sold. Nothing more. That was all.

Bouvier does not define "*life estate*" under that head. He says "*Vide estate for life;*" and under the latter head he says: "An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons."

A life estate is an estate for life. An estate for life is an estate for and during the life of some person. These are all convertible terms. One signifies the same as the other. There is not a shadow of difference between the force of the words used in the two decrees so far as they relate to the real estate sold or to be sold. If there was no power left in Wallach to convey any estate in the land, there was none left in Jenkins.

In Pike *vs.* Wassell, 94 U. S., 711, Chief Justice Waite, delivering the opinion of the court, said:

"In Wallach *vs.* Van Riswick, 92 U. S., 207, we decided that after a seizure and an adjudicated condemnation and sale, under the Confiscation Act of July 17, 1862, 12 Stat. at L., 589, of the lands of one engaged in rebellion against the United States, there was 'left in him NO ESTATE OR INTEREST OF ANY DESCRIPTION WHICH HE COULD CONVEY BY DEED, AND NO POWER WHICH HE COULD EXERCISE IN FAVOR OF

ANOTHER.' We also held, p. 213, that the Joint Resolution passed contemporaneously with the approval of the Act, 12 Stat. at L., 627, was 'intended for the benefit of HIS HEIRS EXCLUSIVELY, to enable them to take the INHERITANCE after his death.' AS TO HIM, THE FORFEITURE WAS COMPLETE AND ABSOLUTE; but the ownership, after his death, was in nowise affected, p. 209 (476), except by placing it beyond his control while living.

"A seizure of the property was necessary to give the court jurisdiction for its condemnation. Miller *vs.* U. S., 11 Wall., 294, 296 (78 U. S., XX, 142); Pelham *vs.* Way, 15 Wall., 201 (82 U. S., XXI, 56); Brown *vs.* Kennedy, 15 Wall., 597; Confiscation Cases, 20 Wall., 108. The proceedings in behalf of the United States were commenced by the seizure, and the decree of condemnation and sale, without doubt, vested in the United States, or the purchaser at the sale, THE INTEREST WHICH THE PERSON PROCEEDED AGAINST HAD IN THE PROPERTY WHEN THE SEIZURE WAS MADE, FREE FROM ALL INTERMEDIATE CONVEYANCES OR INCUMBRANCES, WHETHER THE RESULT OF THE VOLUNTARY ACT OF THE OWNER OR THE ACTION OF HIS CREDITORS AGAINST HIM. WHATEVER INTEREST HE HAD IN THE PROPERTY HAD BEEN SEIZED, AS FORFEITED TO THE UNITED STATES, AND PLACED, PENDING THE SUIT, BEYOND HIS REACH OR THAT OF HIS CREDITORS. ALL SUBSEQUENTLY ACQUIRED RIGHTS WERE SUBJECT TO THE PRIOR CLAIM OF THE UNITED STATES, IF PERFECTED BY A DECREE OF CONDEMNATION.

"In Wallach *vs.* Van Riswick, without undertaking to determine where the fee dwelt during the life estate, we decided that it was withheld from the confiscation EXCLUSIVELY FOR THE BENEFIT OF THE HEIRS. THEY, AND THEY ALONE, COULD TAKE IT AT THE TERMINATION OF THE LIFE ESTATE. The children of Albert Pike, as his heir apparent, are also apparently the next in succession to the estate. Either they or

their representatives must take the title when their father dies. If they do not hold the fee, they are certainly the only persons now living who represent those for whose benefit the Joint Resolution of Congress was passed. They, at least, appear to have the estate in expectancy. Under these circumstances, as there is no one else to look after the interests of the succession, we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance."

The syllabus in the case of French *vs.* Wade, 102 U. S., 132, is as follows:

"1. After a seizure and an adjudicated condemnation and sale, under the Confiscation Act, of the lands of one engaged in rebellion against the United States, THERE IS LEFT IN HIM NO ESTATE OR INTEREST OF ANY DESCRIPTION WHICH HE CAN CONVEY BY DEED.

"2. The Joint Resolution, passed contemporaneously with the approval of the Act, was intended for the benefit of HIS HEIRS EXCLUSIVELY, to enable THEM to take the INHERITANCE AFTER HIS DEATH.

"3. As to him, the FORFEITURE was COMPLETE and ABSOLUTE; but the ownership, after his death, was in no wise affected, except by placing it beyond his control while living.

"4. One who became the purchaser of his own land at a sale under such Act can not convey any title or interest in it BEYOND HIS OWN LIFE."

Chief Justice Waite said:

"We think the court below was right in holding that this case was governed by that of Wallach *vs.* Van Riswick, 92 U. S. 202, in which we decided that after a seizure and adjudicated condemnation and sale under the Confiscation Act of July 17, 1862, of the lands of one engaged in the rebellion against the United States, there was left in him

NO ESTATE OR INTEREST OF ANY DESCRIPTION WHICH HE COULD CONVEY BY DEED, AND NO POWER WHICH HE COULD EXERCISE IN FAVOR OF ANOTHER,' and that the Joint Resolution passed contemporaneously with the approval of the Act was 'intended for the benefit of HIS HEIRS EXCLUSIVELY, to enable them to take the INHERITANCE AFTER HIS DEATH.' As to him, the FORFEITURE WAS COMPLETE AND ABSOLUTE; but the ownership after his death was in no wise affected, except by placing it beyond his control while living.

"This case has been followed many times since, Pike *vs.* Wassell, 94 U. S. 711, and must now be considered as the settled rule of decision of this court.

"Wade by the purchase of his own interest in the property, took the property to HOLD DURING HIS LIFE, THE SAME AS ANY OTHER PURCHASER. Whatever rights another could have acquired by the purchase, he got, but no more. ANOTHER COULD NOT AFTER PURCHASE, HAVE SOLD AND CONVEYED THE INTEREST OF THE HEIRS IN THE PROPERTY; neither can he. By the condemnation and sale, WADE'S ESTATE WAS SEPARATED ENTIRELY FROM THAT OF HIS HEIRS AFTER HIS DEATH, AND THE HEIRS ARE NOT ESTOPPED BY HIS WARRANTY FROM ASSERTING THEIR TITLE."

In Avegno *vs.* Schmidt, 113 U. S., 293, the court said:

"Assuming that the decree of condemnation made by the District Court was valid, its effect was to vest in the United States an estate in the property condemned, for the life of Avegno, AND IT LEFT IN AVEGNO NO ESTATE OR INTEREST OF ANY DESCRIPTION WHICH HE COULD CONVEY BY DEED OR DEVISE BY WILL; but the ownership after his death was in no wise affected, except by placing it beyond his control while living. Wallach *vs.* Van Riswick, 92 U. S. 202; Pike *vs.* Wassell, 94 U.S. 711; French *vs.* Wade, 102 U.S., 132. The cases cited also declare that the Joint Resolution passed contemporaneously with the Act of July 17, 1862, 12 Stat.

at L. 627, was intended for the benefit of the heirs of the person whose property was condemned, TO ENABLE THEM TO TAKE THE INHERITANCE AFTER HIS DEATH. And in the case of Pike *vs.* Wassell, a bill filed during his life-time by the children of the person WHOSE LIFE ESTATE HAS BEEN CONDEMNED AND SOLD, to protect the property from the incumbrance arising FROM THE FAILURE OF THE PURCHASER OF THE LIFE ESTATE to pay the current taxes thereon, was sustained, the court declaring that as there was no one else to look after the interests of the succession, the children might properly be permitted to do so."

In Bigelow *vs.* Forest, 9 Wall., 339, the court said :

"The marshal was ordered to sell the said property, the boundaries of which were given in the title to the decree. Had the purchasers looked at that decree (and knowledge of it must be attributed to them), they would have seen then that it was a decree of confiscation of the land, and THEY WERE BOUND TO KNOW ITS LEGAL EFFECT."

"The heir had no interest in it when IT WAS DECLARED FORFEITED. If, therefore, he is not at liberty to assert his claim, he is denied the right to his property without trial, without any procedure in due course of law, and the practical effect of the law is to assure the purchaser at the marshal's sale the enjoyment of the property after his right has expired, and to give him by estoppel a greater estate than he purchased. No construction of the act of Congress that works such results can be accepted. It is plainly against the true meaning of the Act."

REMAINDER.

It is claimed, the decree of condemnation carved out a technical life estate and left the remainder in Thos. J. Jenkins. This could not be done, for the following reasons, to-wit :

1. The whole estate was seized and forfeited to the United States, and the court had no jurisdiction to carve out a technical life estate and leave the remainder in Jenkins.

2. The life estate of Jenkins, which was sold, was the statutory life estate, and both by the laws of England and America left no title in him, which he could convey or which his creditors could seize.

3. No legal remainder can be left or vested by decree of the court, in any one, because a remainder can only be created by deed or devise.

"An estate in remainder is an estate limited to take effect and be enjoyed after another estate is determined. As, if a man seized, in fee simple, granted lands to A, for twenty years, and after the determination of the said term, then to B and his heirs forever, here A is tenant for years, remainder to B, in fee.

"In the first place, an estate for years is created or carved out of the fee and given to A, and the residue or remainder of it is given to B. But both these interests are, in fact, only one estate; the present term of years, and the remainder afterward, when added together, being equal only to one estate in fee. They are, indeed, different parts, but they constitute only one whole; they are carved out of one and the same inheritance; they are both created, and may both subsist together, the one in possession, the other in expectancy."

Blackstones's Com., vol. 2, p. 164.

Kent's Com., vol. 4, p. 202.

Jarm. on Wills, vol. 2, p 406.

"A remainder is the remnant of an estate in lands or

tenements expectant on a particular estate, created together with the same, at one time.

"A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future; and by which the estate is invariably fixed to remain to a determinate person, after the particular estate has been spent.

"A contingent remainder is one which is limited to take effect on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder can never take effect."

Bouvier's Law Dictionary, vol. 2, p. 441.

Paul *vs.* Frierson, 21 Fla., 529.

"It is not the uncertainty of enjoyment, in future, but the uncertainty of the right of that enjoyment, which makes the difference between a vested and a contingent remainder."

Wiggins *vs.* Perkins, 64 N. H.

"A devise for life, with remainder to the children of the life tenant, creates a vested remainder in the children, whether or not they are born when the will takes effect."

Mercantile Bank, N. Y. *vs.* Ballard, 83 Ky., 481.

Such definitions of a remainder may be found in the reports of all the States, and in all text books on real estate; but nowhere will be found a remainder, except created by deed or devise. NO COURT CAN, BY JUDGMENT OR DECREE, TAKE FROM A MAN HIS TECHNICAL LIFE ESTATE AND LEAVE IN HIM THE REMAINDER, NOT ONLY BECAUSE SUCH AN ESTATE COULD NOT TAKE EFFECT AND BE ENJOYED BY HIM AFTER HIS DEATH; BUT BECAUSE NO COURT HAS EVER EXERCISED SUCH

JURISDICTION AND IT IS WHOLLY INCONSISTENT WITH ALL OUR IDEAS OF JUDICIAL POWER.

Neither can there be a reversion in favor of Thos. J. Jenkins, because:

"A reversion is the residue of an estate left in the grantor, to commence in possession, after the determination of some particular estate granted out of him.

"The reversion arises by operation of law, and not by deed or will, and it is a vested interest or estate, and, in this, it differs from a remainder, which can never be limited unless by deed or devise.

"A reversioner is one entitled to a reversion. Although not in actual possession, the reversioner, having a vested interest in the reversion, is entitled to his action for an injury done to the inheritance."

Bouvier's Law Dictionary, vol. 2, p. 476.

The only cases known to the law where a fee is necessary to uphold an estate in remainder, arise out of executory devises, which are defined, as follows:

"An executory devise is a limitation by will of a future estate or interest in land, which can not, consistently with the rules of law, take effect as a remainder.

"It is a settled rule of law, that if a devise can take effect as an estate in remainder, it shall be so regarded.

"It being a universal rule of law that an estate in remainder by devise can not take effect in future, except there be an estate of freehold, in existence, at the death of the testator less than a fee, by which the estate in remainder may be upheld; whenever it happens that no such estate is in existence, at that time, the estate in remainder becomes void."

Redfield on Wills, vol. 2, p. 262.

All the right, title and interest of Thomas J. Jenkins was seized by the United States and a writ of monition was issued, and all having any interest or claim were duly notified, and all were in default; and the court, having heard the testimony proving that Thomas J. Jenkins was the owner of the property, and was in the army service of the rebels in arms against the United States, found the allegations in the libel were true, and that the life estate of said Jenkins was justly and legally forfeited to the United States, IN PURSUANCE OF LAW FOR THE CAUSES SET FORTH IN THE LIBEL. It was further decreed that the life estate of Thomas J. Jenkins was thereby condemned as enemy's property, and ordered to be appraised, advertised and sold in the manner pointed out by the rules of the court.

The Supreme Court, in the case of Avegno *vs.* Schmidt, 113 U. S., 293, said:

"Assuming that the decree of condemnation made by the district court was valid, its effect was to vest in the United States an estate in the property condemned, FOR THE LIFE OF AVEGNO."

And so say plaintiffs in error in this case, assuming that the decree of condemnation made by the district court was valid, its effect was to vest in the United States an estate in the property conveyed for the life of Jenkins. And what is an estate for the life of Avegno or for the life of Jenkins but a life estate?

In the same case of Avegno *vs.* Schmidt, the court said:

"And in the case of Pike *vs.* Wassell, a bill filed during his life time by the children of the person whose LIFE ESTATE has been condemned and sold, to protect the property from

incumbrance arising from the failure of the purchaser of the LIFE ESTATE to pay the current taxes thereon."

Here the Supreme Court in one sentence twice calls the estate of Pike which was condemned and sold a life estate. And if the court in defining the estate in such a case must call it a LIFE ESTATE, why should it be called anything else in the decree? What estate was it, if it was not the LIFE ESTATE of Thomas J. Jenkins that was condemned and sold?

The court in Wallach *vs.* Van Riswick, 92 U. S., 202, said:

"It is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on war against the Government."

And so plaintiffs in error say it is incredible that the District Court while confiscating an enemy's land intended to leave that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on war against the Government.

And again the court said:

"Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act."

And so plaintiffs in error say, nothing can be plainer, than that the condemnation and sale of the identical property seized was intended by the District Court of the United

It, therefore, becomes the duty of this court to sustain the proceedings of the tribunal under whose decision the sale to Fisk took place, as far as that tribunal kept within the limits of its jurisdiction. The presumptions ought to be liberal in favor of the regularity and competency of such sales, where, no doubt, is raised as to the fairness and official nature of the transaction."

Justice Strong, in delivering the opinion, in Page Ex'r. *vs.* United States, 11. Wall., 268, said:

"Whatever may be true in regard to a rebellion, which does not rise to the magnitude of a war, it must be, that when it has become a recognized war, those who are engaged in it are to be regarded as enemies. And they are not the less such, because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum* the words 'rebels' and 'enemies' in such a state of things are synonymous. And, if this is true, it is evident the statute, in denominating the war rebellion, and the persons whose property it attempts to confiscate rebels, may, at least, have intended to speak of a war and of public enemies. Were this all that could be said it would be enough, for when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power that must be adopted, which is consistent with the Constitution.

"It is always a presumption that the Legislature acts within the scope of its authority."

The same rules of construction and presumptions apply to the judgments and decrees of courts.

I quote from the syllabus in Day *vs.* Micou, 18 Wall., 156:

"1. Under the Confiscation Act of July 17, 1862, and the Joint Resolution of the same date explanatory thereof, only the *life estate* of the person for whose offence the land had been seized, was subject to condemnation and sale.

"2. Nothing more was within the jurisdiction or power of the district court, and a decree condemning the fee could have no greater effect than to subject the *life estate* to sale."

This is repeated by Justice Strong, in delivering the opinion in the case, from which no one of the members of the court dissented.

"The marshal's return to the warrant that he had seized the property, and that he then held it subject to the further order of the court, made the jurisdiction of the court over it complete.

"In revenue cases, as in admiralty, default entered establishes facts averred in the libel or information, and warrants a decree of condemnation, if the information contains the necessary averments."

Page Ex'r. *vs.* United States, 11 Wall., 268.

"Where confiscation proceedings do not come before the court on a writ of error to correct any irregularities or mere errors of law, but collaterally, as the foundation of the defendant's title, no error can be regarded here that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property."

Tyler *vs.* Defrees, 11 Wall., 331.

Chief Justice Waite, in delivering the opinion in Waples *vs.* Hays, 108 U. S., 6, said:

"He (Waples) bought the property for the life of Hays, and that was all he bought. His position was that of a ten-

ant for the life of another. The death of Hays terminated his tenancy."

So, in this case, Bepler or Collard bought the property for the life of Jenkins, and that was all he bought. His position was that of a tenant for the life of another. The death of Jenkins terminated his tenancy.

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action."

Voorhees *vs.* Jackson, 10 Pet., 449.
Gum *vs.* Plant, 94 U. S., 664.
Florentine *vs.* Barton, 2 Wall., 210.
Harvey *vs.* Tyler, 2 Wall., 328.

The syllabus in Kempe *vs.* Kennedy, 5 Cranch, 173, where the land of a married woman was erroneously confiscated, is as follows:

"The inferior court of Common Pleas, for the county of Huntendon, in the State of New Jersey, in May, 1779, had a general jurisdiction, in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause."

I quote from the syllabus in Cooper *vs.* Reynolds, 10 Wall., 316:

"A court can not disregard a judgment in another suit given in evidence before it, or refuse to give it effect on any other ground than a want of jurisdiction in the court which rendered it.

"Jurisdiction of the *res* is obtained by a seizure under

process of the court, whereby it is held to abide such order as the court may make concerning it."

Justice Miller, in deciding the case, said:

"The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

"It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has often been held, by this court, and by all courts, and it takes rank as an axiom of the law.

"Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

See also Thompson *vs.* Tolmie, 2 Pet., 157.

Grignon *vs.* Astor, 2 How., 319.

It follows, therefore, that the use of the words *life estate*, in the decree, must be held, in conformity with law, to embrace all the estate of Jenkins, subject only to the reservation made by the Joint Resolution that it should not be forfeited beyond the life of the offender.

CONCLUSION.

Plaintiffs in error claim there was an ADJUDICATED FORFEITURE and SALE of the lots described in the petition, under the Confiscation Act of Congress of July 17, 1862, and the Joint Resolution of even date therewith, and there was not left in Thomas J. Jenkins any interest which he could convey by deed. That the seizure and sale covered ALL HIS ESTATE and OWNERSHIP in the property DURING HIS LIFE. That is his whole LIFE ESTATE in the property, which is a STATUTORY LIFE ESTATE as distinguished from a TECHNICAL LIFE ESTATE that might be made by deed or will.

The Act and Resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized. It follows then that the estate acquired by the purchaser at the marshal's sale expired on the first day of August, 1872, when Thomas J. Jenkins died.

Bigelow *vs.* Forrest, 9 Wall., 339.

"A forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements or hereditaments, whereby he losses all his interest therein, and they become vested in the party injured, as a recompense for the wrong which he alone, or the public together with himself, hath sustained."

2 Blackstone's Com., 267.

The *life estate* is the same kind referred to in Wallach

vs. Van Riswick, 92 U. S., p. 210, where the court said, after reviewing the English statutes:

"Certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a FORFEITED LIFE ESTATE."

It is the kind of LIFE ESTATE referred to in Avegno *vs.* Schmidt, when the court said:

"And in the case of Pike *vs.* Wassell, a bill filed during his life time by the children of the person whose LIFE ESTATE has been condemned and sold, to protect the property from incumbrance arising from the failure of the purchaser of the LIFE ESTATE to pay the current taxes thereon."

A remainder can be created, only, by deed or devise.

A court can not create a remainder.

No court can, by judgment or decree, take from one having a fee simple, in lands, a life estate, and leave the remainder in the same person. No court has ever exercised such jurisdiction. There are no forms or proceedings, at law or in equity, by which such a thing can be done. The idea is wholly inconsistent with all our notions of judicial power and forms of justice.

Under laws, in England, authorizing the confiscation of property during the natural life, *only*, of the party attainted, no remainder was ever left in the party attainted, and the same reason prevails in this country.

The condemnation and sale does not affect the ownership of the property after the termination of the offender's life. After his death the land passes to his heirs as if it had not been forfeited. A forfeiture of his LIFE ESTATE is complete

and absolute, and leaves no power in him to convey, by deed or otherwise; but the fee being withheld from confiscation exclusively for the benefit of the heirs, they, and they alone, take it at the termination of the life estate.

In a collateral proceeding, however defective, in form, may be a judgment or decree, if it is the adjudication of a court or judge having jurisdiction over the parties and subject matter, it will be held conclusive. And if the language is susceptible of two constructions, that which will uphold the judgment or decree must be adopted; and if a technical word has been used, a court will construe it according to the intention of the court or judge using it, and thereby uphold and sustain the judgment or decree.

Respectfully submitted,

S. A. Miller,

Attorney for Plaintiffs in Error.

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Supreme Court, United States,

OCTOBER TERM, 1891. *TERM NO. 316.*

JULIA A. JENKINS ET AL.
Plaintiffs in Error

Record Case No. 13469 vs.

WILLIAM A. COLLARD,
Defendant in Error

Statement and Brief for Defendant in Error,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

JOHN C. HEALY,
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OCTOBER TERM, 1891. *TERM NO. 316.*

JULIA A. JENKINS ET AL.

Plaintiff in Error.

Record Case No. 13469. vs.

WILLIAM A. COLLARD,

Defendant in Error.

Statement and Brief for Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

This was an action of ejectment brought by the plaintiffs against the defendant in error to recover two lots of land in the City of Cincinnati, with the buildings thereon, known as stores Numbers 50 and 52 West Pearl street.

The petition states that Thomas J. Jenkins, the father of the plaintiffs, being the owner of said lots of land, joined the rebel army, and in the year 1863 such proceedings were had in the District Court of the United States for the Southern District of Ohio, that said property was confiscated and the life estate of said Jenkins was sold, and that afterwards, in the year 1865, the defendant, William A. Collard, became the owner of the life estate so confiscated.

That afterwards, in the year 1872, Thomas J. Jenkins died, at which time the plaintiffs became seized of the legal estate in said premises and entitled to the possession thereof, and that the defendant has since, said time, unlawfully kept them out of such possession. The prayer is for the recovery of the possession of said premises, and for the rents and profits from 1872 until the filing of the petition.

The defendant filed an answer setting up nine defenses.

The first defense, the general issue, was afterwards withdrawn. A demurrer was sustained to defenses numbered from three to nine inclusive, and overruled as to the second.

Thereupon the plaintiff replied to the second defense, but without denying any of the allegations of fact therein contained, merely denied the conclusions of law arising therefrom. To this reply, the defendant demurred, and the Court sustained the demurrer, and the plaintiff not desiring to reply further, a judgment was entered for the defendant. To reverse this judgment, the petition in error was filed by the plaintiffs in error in this Court.

The second defense is as follows: "For a second defense the defendant says that he denies that such proceedings were had in the District Court of the United States within and for the Southern District of Ohio, in the year 1863, or at any other time, that the said property was confiscated, but defendant avers that in a proceeding instituted in said Court in the year 1863, a decree was entered in the words and figures following, to-wit:

DISTRICT COURT UNITED STATES,
SOUTHERN DISTRICT OF OHIO.

The United States,
vs.
Lots and Stores Nos. 50 and 52, Pearl street, Cincinnati.

This cause came on for hearing at this term, upon the libel of information filed herein, and upon the evidence in the case, and the Court find that in prusuance of law, the attorney of the United States for the Southern District of Ohio, did issue to the Marshal of said District his warrant in writing, bearing date March 9th, 1863, commanding him to seize for the cause set forth in said warrant all the right, title and interest of one Thomas J. Jenkins, in and to the real estate described in said warrant, and in said libel of information, and that in pursuance thereof the said Marshal, on the 12th day of March, 1863, seized said real estate and notified the ten-

ants thereof, and also W. A. Collard, agent of said Jenkins, of such seizure by notice in writing. That afterwards, on the 7th day of March, 1863, a writ of monition issued out of this Court, under the laws thereof, to said Marshal, by virtue whereof the usual notice prescribed by law and by the rules of this Court to all persons interested in said real estate to appear in this Court on the first Tuesday of April, 1863, to assert their claims, if any they have, in said real estate was given by said Marshal, which notice was duly published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in said District, for ten days from and after March 18th, 1863, and all persons interested having made default, and the default of all persons being duly entered, and the Court having heard the testimony of the witnesses proving that said Thomas J. Jenkins, of the State of Virginia, at the date of said seizure was the owner of said property, and that ever since the 17th day of July, 1862, the said Thomas J. Jenkins was, and now is, in the army service of the rebels in arms against the United States, to-wit., in the State of Virginia; and the Court further find that the allegations in said libel are true in fact, and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law, for the causes set forth in said libel.

It is further ordered, sentenced and decreed that the life estate of said Thomas J. Jenkins be, and the same is hereby condemned as enemies' property, and that the same be appraised, advertised and sold in the manner pointed out by the rules of this Court, and to that end the necessary process is ordered to be issued to the Marshal to make sale of said real estate in the manner aforesaid, and that upon such sale he bring the proceeds into this Court for distribution; and it is further ordered that the rights of all loyal people to share in such distribution are hereby reserved for further hearing.

Defendant says that the above is the only decree touch-

ing said property, except the decree of confirmation of the sale and distribution of proceeds.

Defendant says that thereafter such proceedings were had in said cause that there was sold and conveyed by the Marshal, in accordance with said decree, the life estate of said Thomas J. Jenkins to one Edward Beplar.

Defendant says that by reason of the premises all the estate of said Jenkins in said property was not condemned and sold, but that there remained in him the reversion or remainder in fee of said property after said life estate sold to said Beplar.

Defendant further says that after the termination of the civil war said Thomas J. Jenkins bargained and sold to the defendant, in consideration of the sum of eighteen thousand dollars paid to said Jenkins by defendant, all the interest and estate of said Jenkins in said property, and did execute and deliver to the defendant, on the 26th day of August, 1865, a deed in fee simple, with covenants of general warranty, binding himself and his heirs, and Susan L. Jenkins, wife of said Thomas J. Jenkins, did join in said deed, and did release all her right and expectancy of dower in said property.

Defendant further says that on the 6th day of June, 1865, said Edward Beplar did execute and deliver to the defendant a deed for said life estate purchased by him at said sale.

Defendant says that by reason of the premises he became the owner in fee simple of the property and entered into possession thereof, and so continued to the present time."

It is clear that the decree of condemnation carved out a technical life estate from the fee simple then owned by Jenkins, and forfeited that estate alone, and not his entire estate, as provided by the Act of Congress.

It will be seen from the language of the answer that Jenkins' entire interest in the land was seized, and if the

simple seizure could vest the title in the Government, then it took the whole. But it has been frequently decided that the mere seizure gave the United States no title. That title was vested only by the decree of condemnation.

Bigelow vs. Forrest, 9 Wall. 350.
Day vs. Micon, 18 Wall. 156.
Semmes vs. The United States, 91 U. S. 21.
Windsor vs. McVeigh, 3rd Otto 274.

In *Bigelow vs. Forrest*, the Court say: "That it was not intended the mere act of seizure should vest the property seized in the United States, is plain from the provisions of the seventh section of the Act of July 17th, 1862 (12th Stat. at L. p. 589), which enacted that to secure the condemnation and sale of any such property, after the same shall have been seized, proceedings in Rem should be instituted in a District Court, and if it should be found to have belonged to a person engaged in rebellion, or who had given aid or comfort thereto, it should be condemned as enemies' property, and become the property of the United States, and that it might be disposed of as the Court might decree."

As the act of seizure therefore vested no title, we are to look wholly to the decree of condemnation for such title, if any, which the Government took, and which was thereafter sold in the proceedings against Jenkins.

Upon the demurrer, we contend first, that the Act of July 17th, 1862, did not authorize the seizure or condemnation of less than the offender's entire interest, and that the decree of confiscation of a technical life estate was for this reason void. Second, if it gave authority to cut off and condemn any designated and separated part of the offender's whole interest, it left the remainder intact, and his subsequent deed conveyed that remainder to his vendee. Third. Admitting that the decree confiscated the entire interest for the offender's life, and left nothing in him which he could sell, and that his warranty deed by which he attempted to con-

vey the fee in 1865, in fact conveyed nothing, we contend, nevertheless, upon the authority of the case of *The Illinois Central Railway vs. Bosworth*, 133 U. S. 92, that on the 25th day of December, 1868, by virtue of the amnesty proclamation, Jenkins was re-invested with the full power of disposition over the remainder. We contend further, that it follows as a logical conclusion from that decision, that the title from that moment passed by estoppel to his grantee and did not descend to his heirs, whom he had bound equally with himself by the covenants of warranty.

First. Did the Statute give authority to seize or condemn less than the whole estate of the offender? The plaintiffs in error rest their case upon the decision in *Wallach vs. Van Riswick*, 92 U. S. 202. In that case this Court, through Justice Strong, construed and gave effect to the provisions of the confiscation Act of July 17th, 1862, with the cotemporaneous resolution passed by Congress explanatory thereof. The problem, attempted to be solved by this legislation, was to provide a method by which an estate in fee owned by a rebel could be forfeited, which would not violate Section 3, Article 3, of the Constitution (which provides that the forfeiture should not last beyond the life of the offender), which would accomplish the double purpose of taking away all the interest which the Constitution gave power to forfeit, and at the same time prevent the sale of the remainder to aid the hostile cause. The method adopted was both ingenious and effective. The Confiscation Act provided for the seizure and condemation of the offender's entire int rest, and the joint resolution provided that such forfeiture should end with his life. If this purpose is kept steadily in view, the Wallach case, from beginning to end, is a most forcible argument in our favor upon the proposition that a forfeiture of a technical life estate, or any part less than the offender's entire interest, would not accomplish the object intended, and was not authorized by the act. There the language of the Stat-

ute was literally followed. The whole interest of the offender was seized, and the whole was condemned. There was no diminuation in the quantity of the estate confiscated. It was not a mere life estate carved out of the fee, but it was the whole estate, taken out of the offender bodily for a limited period. It was upon this theory alone that the case was decided in favor of Wallach's heirs. The clearly defined idea of a difference between a mere life estate and the whole estate, though of limited duration, is the basis upon which the decision rests, and we might say, permeates the whole opinion. On pages 207–208, Justice Strong says:

"The Act of July 17th, 1862, is an act for the confiscation of enemies' property. Its purpose, as well as its justification, was to strengthen the Government, and to enfeeble the public enemy by taking from the a iherents of that enemy the power to use their property in aid of the hostile cause. *Miller vs. United States*, 11 Wall. 268.

With such a purpose it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the Government. The Statute indicates no such intention. The contrary is plainly manifested. The fifth section enacted that it should be the duty of the President of the United States to cause the seizure of "all the estate and property, money, stocks, credits and effects" of the persons thereinafter described (of whom Charles S. Wallach was one), and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner—all his estate or ownership. No authority is given to seize less than the whole. The seventh section of the Act enacted that to

secure the condemnation and sale of any such property (viz., the property seized), so that it might be made available for the purpose aforesaid, proceedings should be instituted in a Court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the Court should decree, the proceeds thereof to be paid into the Treasury of the United States for the purpose aforesaid. Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the Act."

The Confiscation Statute, under the rules of construction, must be strictly construed, and to show how strictly the Supreme Court has construed it, it is only necessary to refer to a few of the cases.

In the *Phoenix Bank vs. Risley*, 111th U. S. 125, there was an attempt to confiscate fifteen thousand dollars due the Bank of Georgetown, South Carolina. The Court held the proceedings void (although the libel attempted to confiscate the "money, stocks, credits and effects" belonging to the Bank of Georgetown, which is now in cash and *on deposit in the Phoenix Bank*), because the proceedings were not commenced by attachment and notice to the bank under 37th Admiralty Rule. In that case it was admitted that the President of the Bank had been served with a copy of the order directing the seizure, and which might under a liberal construction be held equivalent to the ordinary attachment notice.

In *Windson vs. McVeigh*, 3rd Otto 274, the decree of condemnation was held void, because the answer of the

claimant, who was then a rebel, and within the rebel lines, was stricken from the files on motion.

In *Alexandria vs. Fairfax*, 95 U. S. 774, the Court say "in proceedings in Rem where there is not absolute manucaption the evidence which supports a constructive seizure, should be closely scrutinized, and be as satisfactory as would bind a party holding a fund, or owing a debt, the sequestration of which is the object of the suit. In that case service was made in a proceeding to confiscate a debt due by the Village of Alexandria to a rebel, and the Court held that service upon the Corporation Auditor was bad.

In *Pelham vs. Rose*, 9th Wall. 103, it was held that in a proceeding to confiscate a note, actual possession must be secured, and that the decree of condemnation upon a false return by the Marshal, that he had seized the note, when in fact he had not, gave no jurisdiction to the Court.

See also, *Burbank vs. Conrad*, 6th Otto 291, in which the Court lay down the rule that the provisions of the Confiscation Act will not be enlarged by construction.

But it is claimed by counsel for plaintiffs in error that the language of the decree of condemnation in the Wallach case is substantially the same as the language of the decree in this case. The language in the Wallach case is as follows: "It is ordered, sentenced and decreed that all the right, title, interest, and estate, of the said Charles S. Wallach in and to the said real estate, be forfeited and condemned to the United States, for and during the life of the said Charles S. Wallach." In the present case the language is, "It is further ordered, sentenced and decreed that the life estate of said Thomas J. Jenkins be and the same is hereby condemned as enemies' property."

While it is true that the duration of the estate condemned is the same in both cases, yet there is a very marked difference in respect to the quantity of the estate forfeited. In the first case the entire estate in fee simple is taken from

the offender bodily, though for a limited period. The effect of this was to tie his hands and prevent any disposition by him of the remainder. This result could not be accomplished if his interest could be carved up and divided, and any part of it subjected to forfeiture. A technical life estate was only a part of his entire interest like an estate for years, or an estate for the life of another person. The forfeiture of a term of a hundred years in the estate might, in point of duration, be actually greater than the estate forfeited in the Wallach case, but in point of quantity it was a less estate, for it did not take all his interest.

This distinction is stated by Justice Strong in the Wallach case, on page 209, referring to the effect of the joint resolution upon the Act of July 17th, 1862, as follows: "What, then, is its effect? and what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the Act of which it is substantially a part; for its object was, not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life estate which he could sell and convey, his power to aid the public enemy thereby remained. It can not be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation and sale with the particular estate that preceded it. It is to be observed that the joint resolution made no attempt to divide the estate confiscated into one for life and another in fee. It did not say that the forfeiture shall be of a life estate only, or of the possession and enjoyment of the property for life. Its lan-

guage is, "No proceedings shall work a forfeiture beyond the life of the offender; not beyond the life estate of the offender. The obvious meaning is, that the proceedings for condemnation and sale shall not affect the owner of the property after the termination of the offender's natural life. After his death the land shall pass or be owned as if it had not been forfeited. Nothing warrants the belief that it was intended, that, while the forfeiture lasts, it should not be complete, viz., a devolution upon the United States of the offender's entire right."

Again, page 211: "What was seized, condemned as forfeited, and sold, in the proceeding against Charles S. Wallach's estate, was not, therefore, technically a life estate.

"It is true that in *Bigelow vs. Forrest*, 9 Wall. 239, and *Day vs. Micon*, 18 id. 156, some expressions were used indicating an opinion that what was sold under the confiscation acts was a life estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration."

Second. If it is necessary, therefore, that the whole of the interest of the offender should be confiscated in order to prevent him from disposing of the remainder, it logically follows that if less than the whole were condemned, his power over the remainder would remain unaffected. No further discussion of this proposition is necessary.

The last question which we desire to present is the effect of the amnesty proclamation of December 25th, 1868, upon the title conveyed by Thomas J. Jenkins to the defendant Collard in August, 1865. The answer states that the deed conveyed a fee simple with covenants of general warranty. In the case of the *Illinois Central Railroad vs. Bosworth*,

133 U. S. 92, this Court decided that after Bosworth's entire estate was condemned under the Confiscation Act of July 17th, 1862, that the fee still remained in him, although in a state of suspended animation, and that by virtue of a special pardon granted October 2nd, 1865, and the general amnesty proclamation of December 25th, 1868, he was relieved from all disability and had a right to sell the remainder, and that his conveyance vested a perfect title in the vendee as against his heirs, who afterwards sought to recover the property. In that case the deed was made after the granting of the pardon and the proclamation of amnesty. In the present case the deed was made before. In the Bosworth case there was a special pardon as well as a general pardon. In the discussion of the effect of the general amnesty proclamation and of the special pardon, no greater effect is given to one than to the other, in the opinion of the Court, and we submit that no reason exists why Thomas J. Jenkins, by virtue of the general amnesty proclamation of December 25th, 1868, was not made, as it were, a new man, and entirely absolved from all penalties incurred by reason of having been a rebel. If we are correct in this, from that instant he had the power of disposition of the remainder of his property. The rights of his heirs had not then attached.

In the case last above cited, on page 103, Justice Bradley says: "Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty—so removed as to restore him to all his rights, privileges and immunities, as if he had never offended, except as to those things which become vested in other persons—why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment, it does restore him to such control. In the opinion of the Court in the case of Ex Parte Garland, 4 Wall. 333, 380, the effect of a pardon is stated as

follows, to-wit: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

If, therefore, the effect of the amnesty proclamation restored to Jenkins the full power of disposition and absolute control over the remainder which had not been forfeited, from that instant the title so held and re-acquired enured to the benefit of his grantee by estoppel.

In *Van Rensselaer vs. Kearney*, 11 Howard 297, it was held that where the owner of a life estate made a deed of bargain and sale purporting to convey the fee, but without covenants of warranty, and afterwards acquired the fee that his heirs were estopped from claiming the fee after the termination of the life estate.

In *Bush vs. Marshal*, 6 Howard 284, and *Irvine vs. Irvine*, 8 Wall. 617, it was held that where one makes a deed of land covenanting that he is the owner, a subsequently acquired title enures to the benefit of his grantee.

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